IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA Plaintiff, v. DTE ENERGY COMPANY, and DETROIT EDISON COMPANY Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

PLAINTIFF'S JOINT OPPOSITION TO DEFENDANTS' MOTION TO STRIKE AND MOTION TO STAY, OR, IN THE ALTERNATIVE, FOR EXTENSION OF TIME

ISSUES PRESENTED

Pursuant to Local Rule 7.1(d)(2), the issues presented by Defendants' motions are:

1. Whether the United States' motion for preliminary injunction should be stricken without further consideration.

2. Whether the Court should stay proceedings or allow Defendants more time to respond to motion for preliminary injunction.

The leading authority supporting Plaintiff's argument is set forth on the next page.

LEADING AUTHORITY FOR THE RELIEF SOUGHT

I. There Is No Cause To Strike The United States' Motion For Preliminary Injunction

Anderson v. United States, 39 Fed. Appx. 132 (6th Cir. 2002)

New York State Elec. & Gas Corp. v. U.S. Gas & Elec., Inc., 697 F.Supp.2d 415 (W.D.N.Y. 2010)

Thornton v. U.S. Dept of Labor, No. 00-CV-72206 DT, 2000 WL 1923502 (E.D. Mich. Nov. 17, 2000)

11 A Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure* § 2948.2 (2d ed. 2009)

II. There Is No Cause To Delay Hearing Of The United States' Motion

Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70, 415 U.S. 423 (1974)

Certified Restoration Dry Cleaning, LLC v. Tenke Corp., 511 F.3d 535 (6th Cir. 2007).

In re Eagle-Picher Indus, Inc., 963 F.2d 855 (6th Cir. 1992)

INTRODUCTION

In seeking to deny or delay consideration of the United States' motion for preliminary injunction, Defendants do not challenge the fundamental logic supporting the motion:

- If the Monroe Unit 2 overhaul constituted a major modification under New Source Review ("NSR"), then Defendants were required to obtain a permit and install pollution controls;
- The required pollution controls would dramatically reduce emissions by 90% or more; and
- The failure to install such controls, and obtain such pollution reductions, is causing significant harm to the public health downwind of Monroe Unit 2.

As the United States describes in our brief in support ("U.S. Brief") of the motion for preliminary injunction ("U.S. Motion"), the illegal pollution from Monroe Unit 2 causes premature death, heart attacks, and respiratory problems, among other health effects. The leading authority on air pollution health effects estimated the health impact at 90 deaths per year.

The unique circumstances here warrant preliminary relief: the massive Monroe Unit 2 overhaul was completed just two months ago, cannot be considered routine, and the company itself projects a huge emissions increase. Moreover, EPA warned DTE during construction that restarting the unit would violate the law, and the company proceeded anyway, apparently assuming that any requirement to comply with NSR would be years away. Defendants have yet to identify any material facts in dispute. Thus, the United States comes before this Court seeking *interim* relief (not permanent relief as DTE incorrectly argues) designed to mitigate the harm from Defendants' violation of law.

The alleged violations have serious consequences for public health and the preliminary injunction motion should be heard on the merits as soon as possible. The United States respectfully requests that Defendants' motion to strike the preliminary injunction motion and the motion to stay proceedings be denied in full. The United States further requests that the Court set a response deadline for Defendants that allows the hearing of the injunction to proceed as expeditiously as possible, given the paramount health impacts at stake.[1]

ARGUMENT

Both of DTE's motions are based on a faulty premise. DTE repeatedly asserts that the United States is seeking "a final determination on liability and remedy and permanent relief for the violations it alleges in its Complaint." Doc. No. 16 ("DTE Stay Brief") at 4. This claim is the primary basis both for the motion to strike and the associated motion to stay proceedings. *See* Doc. No. 15 ("DTE Strike Brief") at 17; DTE Stay Brief at 4.

DTE's claim is simply not true. Permanent relief for the alleged violations would require DTE to obtain NSR permits and install top-of-the-line pollution controls to meet the limits set by those permits. *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 850 (S.D. Ohio 2003). By contrast, the Motion asks the Court to order DTE to *begin* the process of obtaining the necessary NSR permits and reduce emissions so that the illegal pollution from Monroe Unit 2 will be offset by reductions in the company's coal-fired fleet. U.S. Brief at 29-30. Neither of these steps is permanent. Should the Court eventually find that DTE did not break the law, the company could withdraw its permit application and cease its pollution reduction measures.

Once DTE's faulty foundation is exposed, there is no basis for striking the Motion or staying the proceedings. The United States has alleged a flagrant violation of an important statutory program designed to protect human health and the environment. That violation is

[1] As Defendants correctly state, Plaintiff has no objection to DTE filing a 36-page brief in response to our Motion.

causing significant harm to human health. The public interest compels hearing the Motion as soon as possible so that it can be decided on the merits and the appropriate relief be expeditiously ordered.

I. There Is No Basis To Strike The Preliminary Injunction Motion

A. The Motion Is Procedurally Proper

There is nothing procedurally improper about the United States' motion for preliminary injunctive relief. Tellingly, Defendants cite no case in which a preliminary injunction motion is stricken, nor do they cite any rule of civil procedure as a basis for striking the Motion.

As described above, Defendants' argument is infirm because it rests on a hollow foundation: the United States is simply *not* seeking permanent relief here.[2] Defendants' misunderstanding is displayed on the first page of their brief supporting the motion to strike, where they claim that the Motion asks the Court to order DTE to spend "hundreds of millions of dollars on . . . additional controls on the unit at issue." DTE Strike Brief at 1. Defendants have confused the permanent relief the United States will seek after a final liability determination and the interim relief we seek in our current Motion. *Permanent* relief would require an NSR permit and installing flue gas desulfurization ("FGD") and selective catalytic reduction ("SCR"), the top-of-the-line pollution controls for SO_2 and NO_X, respectively. DTE's own announced estimates put the total capital cost of installing FGD and SCR at Monroe Unit 2 at about $630 million. U.S. Brief at 32 and Exs. 2-B and 3 ¶30. By contrast, the United States described in our Brief an *interim* reduction program that would mitigate the illegal pollution from Monroe Unit 2 at a capital cost of $39 million and annual operating costs of $14 million. Brief at 31. While not

[2] As an aside, the United States notes that there is no bar against obtaining permanent relief at the preliminary injunction stage, so long as the traditional test for injunctive relief is met. *Boston Celtics Ltd. P'ship v. Shaw*, 908 F.2d 1041, 1048 (1st Cir. 1990); 11 A Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure*, § 2948.2 (2d ed. 2009). The Court need not consider this issue, however, for the reasons described in the text.

insignificant, this cost is small compared to Detroit Edison's business and profits, and would not have a significant impact on its customers. Brief at 32. It is also a far cry from the hundreds of millions of dollars upon which Defendants based their argument. DTE Strike Brief at 1.

Defendants' reliance on *Lowery v. Beztak Properties* is unavailing. *See* DTE Strike Brief at 16-17, 19. As an initial matter, *Beztak* decided a preliminary injunction motion on the merits, not on a motion to strike. Judge Edmunds noted that Magistrate Judge Morgan "balanced the required factors" and determined that a preliminary injunction was not warranted. No. 06-13408, 2009 WL 309390, *1 (E.D. Mich. Feb. 3, 2009). Here Defendants attempt to preclude the Court from considering the equities. In *Beztak* the magistrate judge found that the plaintiffs were not likely to succeed on the merits and had not alleged any facts to establish irreparable injury. *Id.* at *2-3. The motion was "premature" because the plaintiffs there had not amassed evidence sufficient to meet the standard for preliminary relief. *See id.* at *6, *11. Defendants prove too much by quoting out of context Magistrate Judge Morgan's observation that "no determination by a court has been made regarding defendant's liability or plaintiffs' entitlement to relief." *Id.* at 6; Strike Brief at 16. Were that the rule, preliminary injunctive relief would *never* be appropriate; once liability is established, the relief is no longer preliminary. Similarly, Defendants' argument that "the Court cannot impose costly compliance obligations until a *final* judgment of *noncompliance* is entered" simply ignores the reality of equitable practice. There is no bar on "costly" relief at the preliminary stage, only the Court's judgment to weigh the balance of harms and the public interest. As described in the United States' Brief, the human health toll of *not* reducing DTE's pollution vastly outweighs the cost to DTE of doing so. U.S. Brief at 26-28, 32-33.

Similarly, there is no basis in equity for DTE's claim that NSR cases are too complicated for preliminary injunctive relief.[3] *Contra* DTE Strike Brief at 1-2; 18-19. As the Second Circuit recently explained, "Preliminary injunctions should not be mechanically confined to cases that are simple or easy." *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010); 11 A Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure, § 2948.3 (2d ed. 2009) ("The very purpose of an injunction under Rule 65(a) is to give temporary relief based on a preliminary estimate of the strength of plaintiff's suit, prior to the resolution at trial of the factual disputes and difficulties presented by the case. Limiting the preliminary injunction to cases that do not present significant difficulties would deprive the remedy of much of its utility."). In any event, whether prior cases found summary judgment appropriate is not predictive of whether preliminary relief is appropriate on the facts here. First, this case stands apart because of its huge scope, DTE's huge projected emissions increase, and the company's disregard of EPA's warning not to illegally operate the unit after the modification. Second, the standard for summary judgment is critically different than that for preliminary injunction. At the summary judgment stage, there must be *no* material facts in dispute, and the harm from the alleged violation is immaterial. Here there can be disputed facts (though DTE has yet to allege any), as long as the balance of equitable factors favors relief. Nor is the fact that the United States has not sought preliminary injunctions in prior

[3] Defendants also engage in a lengthy discussion of the history of NSR enforcement, claiming that EPA's interpretation of NSR has shifted over time. DTE Strike Brief at 8-12. This discussion is irrelevant and misleading. The allegations of EPA shifts cited by DTE all relate to the routine maintenance exemption, and EPA's interpretation has not changed significantly over time. *See e.g., United States v. Southern Indiana Gas and Elec. Co.*, No. IP 99-1692-C-M/F, 2003 WL 446280, at *2 (S.D. Ind. Feb. 18, 2003) (EPA's "current interpretation of routine maintenance is reasonable, and *consistent with its past formulation of the test*" going back to at least 1988) (emphasis added). That interpretation was specifically presented to Defendants in the May 2000 applicability determination described in the preliminary injunction brief. *See* U.S. Brief at 7 and Ex. 4. In any event, no matter what the standard applied, the unprecedented extreme makeover at issue here is not routine maintenance.

DTE also quotes extensively from an Eleventh Circuit case without making clear that the court was not challenging EPA's interpretation of the NSR rules, but the administrative mechanism used to pursue violations against the Tennessee Valley Authority, another arm of the government. DTE Strike Brief at 10 (quoting *TVA v. Whitman*, 336 F.3d 1236 (11th Cir. 2003)). That decision has no relevance here.

NSR cases relevant. Each preliminary injunction must be evaluated on its own merits, and the United States exercises enforcement discretion to determine how to proceed. *See generally Ohio Pub. Int. Research Group v. Whitman*, 386 F.3d 792, 795-99 (6th Cir. 2004) (discussing concept of enforcement discretion).

Finally, even if Defendants' argument had any validity, it is fundamentally a merits challenge to the Motion, not a reason to strike the Motion without hearing. *See, e.g., New York State Elec. & Gas Corp. v. U.S. Gas & Elec., Inc.*, 697 F. Supp. 2d 415, 439 (W.D.N.Y. 2010) (noting general disfavor for motions to strike and stating, "If [the preliminary injunction] motion were ultimately shown to have no basis in fact, then the Court would simply deny the motion. . . . I see no need to strike NYSEG's motion."). Motions to strike "'should be used sparingly by the courts'" and "'resorted to only when required for the purposes of justice'" and when "'the pleading to be stricken has no possible relation to the controversy.'" *Anderson v. United States*, 39 Fed. Appx. 132, 135 (6th Cir. 2002) (quoting *Brown & Williamson Tobacco Corp. v. United States*, 201 F.2d 819, 822 (6th Cir. 1953). This standard is not satisfied here. Defendants essentially argue that the Court should strike the motion because they believe preliminary injunctive relief is not appropriate; if that were a sufficient basis to grant a motion to strike, such motions would be commonplace.

B. Rule 7.1 Does Not Require Striking the Motion

The United States concedes that our Brief did not comply with the letter of Local Rule 7.1(a), and that the Court's discretionary remedial authority includes striking motions on that ground.[4] We suggest that such a course is not appropriate here for the following reasons.

[4] We assume that Local Rule 7.1(a) applies here. *But see Quicken Loans v. Jolly*, No. 2:07-CV-13143, 2007 WL 4547865, at *2 (E.D. Mich. Dec. 19, 2007) ("Because Defendant Brooks has not appeared in the case, seeking her concurrence in this motion is not required under Eastern District of Michigan Local Rule 7.1(a).") (footnote omitted). No counsel for Defendants had appeared at the time of the Motion.

First, the United States did advise Defendants of the motion and understood that Defendants would not agree to it. In the June 16, 2010 telephone conference between the parties following the June 4, 2010 Notice of Violation, counsel made clear that EPA considered the Monroe Unit 2 overhaul a flagrant violation of NSR, and that to settle the matter DTE would have to achieve the interim pollution reductions as later sought by the Motion. Ex. A., Declaration of Thomas A. Benson ¶3. DTE refused. *Id.* In addition, the undersigned counsel contacted DTE attorney Michael J. Solo on August 4, 2010, the day before filing the complaint. *Id.* ¶4. In that telephone conversation, Mr. Solo was informed that the United States would be filing a complaint and a preliminary injunction seeking relief as described in the Motion. *Id.* ¶¶4-5. Mr. Solo did not indicate any reason to expect concurrence or that further discussion would be fruitful. *Id.* ¶6. Thus there is no prejudice to Defendants or the purpose of Local Rule 7.1(a) from any technical failure to comply with Local Rule 7.1(a).

If the motion to strike were granted, requiring the government to expressly comply with Local Rule 7.1(a) before resubmitting its motion for preliminary relief, the only practical effect would be to allow DTE more time to respond. We respectfully suggest that the Court could achieve the same result, if it deems it appropriate, by simply granting an extension of time. Whether Local Rule 7.1 has been violated and the nature of any response is within the discretion of the trial court. *See, e.g., Walls v. City of Detroit,* No. 92-1846, 1993 WL 158948, at *4 (6th Cir. May 14, 1993) ("these matters are best left to the district court"). The Court need not take action against the Motion. *See United States. v. Twenty-one Thousand Dollars*, 298 F. Supp. 2d 597, 602 (E.D. Mich. 2003) (invoking Local Rule 1.2 to suspend requirements of Local Rule 7.1(a)); *Thornton v. U.S. Dept of Labor*, No. 00-CV-72206 DT, 2000 WL 1923502, at *1 (E.D. Mich. Nov. 17, 2000) ("the Court believes that the interests of justice would not be served by

granting Plaintiff's motion on the grounds of a technical violation of a rule which is 'largely an empty formality in the case of dispositive motions.'") (quoting *Walls,* 993 F.2d 1548, 1993 WL 158498 (6th Cir.1993)).

II. There Is No Basis To Delay Hearing The Preliminary Injunction Motion

As described above, there is no basis for Defendants' motion to strike, and thus no reason to stay proceedings during consideration of the motion. Turning to Defendants' alternative request, the United States believes that there is no need for Defendants to have 90 days to respond, and that the flagrant nature of the violation and the compelling public interest served by this case warrants hearing the Motion as soon as is practical.

A. Defendants Should Be Able to Prepare for an October Hearing

There is no reason that Defendants need 90 days to prepare a response. While the United States is not averse to some additional time, we describe below the reasons that Defendants ought to be prepared to respond in the time set by the local rules and the hearing date initially set by the Court.

"The notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 433 n.7 (1974). While same day notice of a preliminary injunction hearing is clearly insufficient, *id.*, "[a] district court is not at leisure to permit those against whom injunctions are sought to sharpen their arguments indefinitely." *United States v. Alabama*, 791 F.2d 1450, 1458 (11th Cir. 1986). Rather, "broad discretion is given to the district court to manage the timing and process for entry of all interlocutory injunctions - both TROs and preliminary injunctions - so long as the opposing party is given a

reasonable opportunity, commensurate with the scarcity of time under the circumstances, to prepare a defense and advance reasons why the injunction should not issue." *Ciena Corp. v. Jarrard*, 203 F.3d 312, 319 (4th Cir. 2000). The local rules and the Court's hearing date allow Defendants a reasonable time to prepare.

First, Defendants have failed to articulate any information they need to defend against the injunction. A full blown evidentiary hearing – and the commensurate preparation – "is only required when there are disputed factual issues, and not when issues are primarily questions of law." *Certified Restoration Dry Cleaning, LLC v. Tenke Corp.*, 511 F.3d 535, 552 (6th Cir. 2007). While there are numerous facts relevant to a determination of NSR applicability, Defendants have yet to identify any facts that are in dispute. *See In re Eagle-Picher Indus, Inc.*, 963 F.2d 855, 859 (6th Cir. 1992) ("Because ASI did not present significant questions of disputed facts in its offer of proof, the bankruptcy court did not err in reaching its own conclusions [in a preliminary injunction motion] without benefit of a full evidentiary hearing."). Rather than telling the Court why they need 90 days to prepare for this case, Defendants largely recite a one-sided history of *other* NSR enforcement cases conducted over the last decade. *See* DTE Stay Brief at 6. The dispute here appears to be about the application of the law to the facts that the Parties recognize. Moreover, the relevant facts are largely project-specific, and so are singularly within Defendants' control.

Second, Defendants have had ample notice that they would likely have to litigate this project. DTE has been on actual notice of EPA's interpretation of NSR since at least 2000, when the agency provided a detailed applicability determination for another Monroe project conducted by Defendants. *See* U.S. Brief at 7 and Ex. 4. In July 2009, the agency issued a notice of violation setting forth 35 NSR violations at Defendants' coal-fired power plants. U.S. Brief at

12. After several letters seeking information about the Monroe Unit 2 overhaul, EPA issued a notice of violation specific to this project on June 4, 2010. U.S. Brief at 13 and Ex. 2-E. An accompanying letter stated that: "The seriousness of the violation would be compounded by beginning operation of the illegally modified unit." U.S. Brief Ex. 2-J. After DTE rebuffed the United States' June 16, 2010 proposal to settle its claims, EPA sent another letter stating that "DTE's violation of law compels EPA to act. While we remain willing to discuss [settlement] we are obligated in the meantime to continue to explore and exercise our options for expedited relief of this ongoing violation." Ex. B, July 1, 2010 Letter from A. Chapman (EPA) to M. Solo (DTE). DTE had plenty of advance warning that it would be sued and appropriate relief would be sought. *See, e.g., United States v. Michigan*, 534 F. Supp. 668, 669 (W.D. Mich. 1982) (scheduling preliminary injunction hearing in only four days when pre-filing letters and other circumstances indicated defendant's "claim of surprise, and motions for an adjournment and for additional delay to conduct discovery are without support").

Finally, the applicable NSR rules required DTE to conduct an NSR analysis *before* beginning the project. Michigan's federally-approved State Implementation Plan ("SIP") requires

> Before beginning actual construction of the project, the owner or operator shall document and maintain a record of all of the following information . . . A description of the applicability test used to determine that the project is not a major modification . . . including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under [the capable of accommodating exclusion] and an explanation for why such amount was excluded, and any netting calculations, if applicable.

Mich. Admin. Code R. 336.2818(3)(a), (3)(f), (4). DTE states that for the Monroe Unit 2 overhaul, it sent a letter reflecting its determination to the state permitting authority. DTE Strike Brief at 4-5. The foundation of any defense DTE has in this case has been set for five months.

There is no reason that DTE could not have been ready to answer the United States' Motion by the time it was filed. This is not a trial by ambush, as Defendants claim, *e.g.*, DTE Strike Brief at 15, but litigation that DTE should have expected as soon as it began its "Extreme Makeover: Power plant edition." U.S. Brief Ex. 2-D.

B. The Nature of the Harm at Issue Compels Expeditious Resolution

The United States' evidence shows that Defendants' failure to comply with the law results in air pollution that is harming the public health. *See* U.S. Brief at 26-28. The scientific consensus, recognized by the courts, is that the pollution at issue here causes premature death, heart attacks, and respiratory problems, among other effects. *Id.* Looking at the illegal emissions in this case, a preeminent scholar on air pollution's health effects estimated that the pollution caused by Defendants' failure to follow the law will cause about 90 deaths per year. The interim relief sought in the Motion is designed to avoid that harm.

While they have not yet challenged the basis of the harm proof, Defendants attempt to minimize the harm by stating that DTE has agreed to limit Monroe Unit 2's pollution to pre-project levels. DTE Stay Brief at 4. This offer fails to address the harm at issue. As the United States describes in our Brief, New Source Review is designed not to *maintain* pollution from individual sources but to *sharply reduce* pollution whenever a source undergoes a major modification. U.S. Brief at 1, 3-4. The public will not get the benefit of that statutorily-mandated pollution reduction until the Court grants relief,[5] and the additional pollution in the meantime is causing the significant harm to the public health.

Finally, without preliminary relief, DTE gets to comply with the law on its own terms and own its own timetable. The company stated in its briefing that it plans to begin operating

[5] To the extent such relief does more than preserve the *status quo ante*, there is no dispute that the Court has the authority to do so at the preliminary injunction stage. DTE Strike Brief at 17.

FGD and SCR by 2014. While, the Parties agree that these controls are part of the appropriate *permanent* relief, under NSR, DTE was required to operate those controls as soon as it restarted after the modification. Blocking preliminary injunctive relief allows the company to use its existing business plan and preferred timing for pollution controls to comply with the law.

CONCLUSION

Defendants' motions are predicated on the incorrect claim that Plaintiffs are seeking permanent relief through a preliminary injunction. There is no reason to deny or delay hearing of the United States' motion, which addresses a recent, flagrant violation of law causing significant harm to the public health. Plaintiff respectfully requests that Defendants' motions to strike and stay proceedings be denied, and that any extension of time for Defendants to respond be limited in light of the importance of promptly hearing the merits of the preliminary injunction motion.

Respectfully Submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division

Dated: August 23, 2010

/s/ Thomas A. Benson
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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2010, the foregoing opposition was filed electronically using the Court's ECF system and automatically served through the Court's ECF system on the following counsel:

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I further certify that I have mailed the foregoing opposition to the following non-ECF participants:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA Plaintiff, v. DTE ENERGY COMPANY, and DETROIT EDISON COMPANY Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

PLAINTIFF'S JOINT OPPOSITION TO DEFENDANTS' MOTION TO STRIKE AND MOTION TO STAY, OR, IN THE ALTERNATIVE, FOR EXTENSION OF TIME

APPENDIX 1:
LIST OF EXHIBITS

A. Declaration of Thomas A. Benson

B. July 1, 2010 Letter from Apple Chapman, U.S. EPA, to Michael Solo, DTE Energy

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA Plaintiff, v. DTE ENERGY COMPANY, and DETROIT EDISON COMPANY Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

PLAINTIFF'S JOINT OPPOSITION TO DEFENDANTS' MOTION TO STRIKE AND MOTION TO STAY, OR, IN THE ALTERNATIVE, FOR EXTENSION OF TIME

EXHIBIT A
(Declaration of Thomas A. Benson)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA Plaintiff, v. DTE ENERGY COMPANY, and DETROIT EDISON COMPANY Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

DECLARATION OF THOMAS A. BENSON

I, Thomas A. Benson, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am a Trial Attorney in the Environmental Enforcement Section, Environment and Natural Resources Division, of the United States Department of Justice ("DOJ"), and am a counsel for the Plaintiff United States of America in this litigation.

2. I make this declaration in support of *Plaintiff's Joint Opposition to Defendants' Motion to Strike and Motion to Stay, or, in the Alternative, for Extension of Time.*

3. On June 16, 2010, counsel for EPA held a telephone conference with counsel for Defendants, including DTE Energy in-house counsel Michael J. Solo and attorneys from the law firm Hunton & Williams. During that conference, EPA informed Defendants that to settle the June 4, 2010 Notice of Violation related to the Monroe Unit 2 overhaul, *inter alia*, Defendants would have to reduce emissions from its coal-fired fleet in an amount equal to the illegal emissions from Monroe Unit 2. By letter on June 23, 2010, Defendants refused the settlement paradigm proposed by EPA, including any reductions to mitigate Monroe Unit 2's illegal emissions.

4. On August 4, 2010, I contacted DTE Energy in-house counsel Michael J. Solo by telephone. I informed Mr. Solo that the United States planned to file a complaint concerning the Monroe Unit 2 modification performed in March through June 2010. I stated that the United States would likely file the complaint the following day, August 5, 2010.

5. I further informed Mr. Solo that the United States would seek a preliminary injunction for the alleged violations at Monroe Unit 2. I stated that the United States would file the preliminary injunction motion as early as August 6, 2010, and that we would be seeking pollution reductions equal to the pollution from Monroe Unit 2.

6. In our conversation, Mr. Solo gave no indication that concurrence on the preliminary injunction motion could be possible.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: August 23, 2010

s/Thomas A. Benson
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	Civil Action No. 2:10-cv-13101-BAF-RSW
	)	
v.	)	Judge Bernard A. Friedman
	)	
DTE ENERGY COMPANY, and DETROIT EDISON COMPANY	)	Magistrate Judge R. Steven Whalen
	)	
Defendants.	)	

PLAINTIFF'S JOINT OPPOSITION TO DEFENDANTS' MOTION TO STRIKE AND MOTION TO STAY, OR, IN THE ALTERNATIVE, FOR EXTENSION OF TIME

EXHIBIT B

(July 1, 2010 Letter from Apple Chapman, U.S. EPA, to Michael Solo, DTE Energy)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

July 1, 2010

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

FRE 408 SETTLEMENT COMMUNICATIONS

Michael Solo, Esq.
DTE Energy
One Energy Plaza
Detroit, MI 48226-1279

Dear Mr. Solo:

We have reviewed your letter of June 23, 2010 ("Letter"). Given the substance of your offer, we do not believe it would be productive to have additional settlement talks at this time. In our discussion on June 16, we made clear that, in light of the flagrant violation of New Source Review ("NSR") at Monroe Unit 2, and as a gesture of seriousness concerning the system-wide settlement efforts, we would require DTE to provide a plan for mitigating the excess emissions at Monroe Unit 2 going forward. We further specified that DTE would be required to attain emissions reductions on the order that reductions would be achieved by installing a flue gas desulfurization unit ("FGD") and selective catalytic reduction system ("SCR") at Monroe Unit 2. DTE has failed to provide a mitigation plan that meets these criteria. Rather, the majority of your letter merely attempts to argue the merits of your position.

While we believe our position has been clearly stated in litigation, regulation, and applicability determinations – including the May 2000 applicability determination issued to Detroit Edison for another project at the Monroe plant – we respond to several of the points in the Letter below in order to ensure that there is no misunderstanding.

RELIABILITY

The Letter states that Monroe Unit 2 is "crucial to maintaining reserve margins and reliability, especially during the upcoming summer months." We are not aware of any basis for believing that the shutdown of Monroe Unit 2 until it comes into compliance with the law will create irresolvable reliability or other service issues. In order to ensure that we have the information necessary to evaluate this claim, please provide the information sought in the information request pursuant to Section 114 of the Clean Air Act that is attached to this letter.

NON-ROUTINE PHYSICAL CHANGE

The Letter also argues that DTE's Monroe Unit 2 project was routine maintenance, repair and replacement ("RMRR") under *National Parks Conservation Ass'n et al. v. Tennessee Valley Authority,* Case No. 3:;01-CV-71, 2010 WL 1291335 (E.D. Tenn. Mar. 31, 2010)[1], and therefore, qualifies for a regulatory exemption. *See also,* 40 C.F.R. § 52.21(b)(2). As you know, a "major modification" under NSR is defined as a physical change or change in the method of operation that results in a significant net emissions increase. The term "modification" means *any physical change* in, or the change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted. CAA §111(a)(4) (emphasis added).

In *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), the court recognized EPA's discretion to exempt from NSR permitting requirements "some emission increases on the grounds of *de minimis* or administrative necessity." *Id. at* 400. "Reliance on the *de minimis* doctrine invokes congressional intent that agencies diverge from the plain meaning of a statute only so far as is necessary to avoid its futile application." *New York v. EPA*, 443 F.3d 880, 888 (D.C. Cir. 2006). Proper application of the *de minimis* standard serves to alleviate sources from "severe" administrative and economic burdens that would otherwise be triggered by "minuscule" emission increases. *Alabama Power* at 405. Accordingly, the RMRR exemption applies to only a narrow range of activities. *See also, Cinergy,* 2006 WL 372726, at *2.

In evaluating whether a project is routine, EPA considers the following factors for the project: (1) nature and extent; (2) purpose; (3) frequency; and (4) cost (known as the "WEPCO factors"). *See, e.g., United States v. Ohio Edison Co.*, 276 F. Supp.2d 829, 834 (S.D. Ohio 2003); Letter from F. Lyons, U.S. EPA Region 5, to H. Nickel (May 23, 2000) ("Detroit Edison Applicability Determination"); Memorandum from Don Clay, EPA, to David A. Kee, EPA (Sep. 9, 1988); *Tenn. Valley Auth.*, 9 E.A.D. CAA Docket No. 00-6 (U.S. Envt'l Prot. Agency Sept. 15, 2000). With respect to the frequency factor:

> It is the frequency of an activity at a particular unit that is most instructive in the analysis of what can be considered 'routine.' The types of activities undertaken within the industry as a whole have little bearing on the issue if an activity is performed only once or twice in the lifetime of that particular unit.

Ohio Edison, 276 F. Supp.2d at 856. The burden of demonstrating that the RMRR exemption applies rests with DTE. *See, e.g., Ohio Edison,* 276 F. Supp. 2d at 856 (citing *First City Nat'l Bank of Houston*, 386 U.S. at 366).

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[1] In its June 1, 2010 letter responding to EPA's statutory information request, DTE argues that the project does not require a permit because it is RMRR under "EPA's historic and Michigan's implementation of that term." DTE is plainly wrong.

Application of the WEPCO factors to DTE's current construction activity at Monroe Unit 2 demonstrates that it is a non-routine physical change:

1. Nature and Extent:
   - Over 10 months to plan
   - 83-day outage planned
   - Over 600 construction workers working on two 10-hour shifts 6 days/week
   - Lead by third party engineering firm
   - Approximately 2,000 square feet of waterwall tubing replaced
   - Complete replacement of economizer: removal and replacement of 323 tube elements with 642 elements creating an 80-foot wide array of tubes
   - Involved a redesign of the economizer to reduce historic flow and tube pluggage problems
   - Replacement of all reheater inlet and outlet pendants
   - DTE utilized a crane monorail system specifically built for the project.
   - More than 500 lifts by the crane were needed to complete the project.
   - Described as including two "major capital projects" (economizer and reheater) to the Michigan Public Service Commission
   - DTE publically described the project as a "large, labor-intensive job"
   - DTE further stated that "bottom line, the plant boiler unit will run far more efficiently and have an extended life"

2. Purpose: DTE's capital appropriation request for the economizer replacement states that this project is being undertaken to "address the lost availability due to economizer tube leaks and improve availability". It further states that the replacement will "reduce future outages" and "provide substantial benefits to the customer."

3. Frequency: DTE stated that this is the first time in the 37 year life of the plant that either the economizer or reheater pendants have been replaced.

4. Cost: DTE spent approximately $65 million for the entire outage (an estimated $14.5 million each for the replacement of the reheat pendants, and the economizer, and over $6 million for the waterwall panel replacement).

Additionally, DTE has received prior notice that projects such as these do not qualify for the RMRR exemption. In 2000, EPA issued an Applicability Determination to DTE operating subsidiary Detroit Edison in which EPA found that a $12 million project was not routine and noted that the agency had found projects non-routine when costing as little as $905,000. Detroit Edison Applicability Determination at 23-24.

DTE NOTIFICATION LETTER

On March 12, 2010, the day before beginning the project outage, you provided emissions calculations to the Michigan Department of Natural Resources and the Environment ("MDNRE") projecting an actual emissions increase of 3,701 tons per year (tpy) of SO_2 and 4,096 tpy of NO_x. DTE Planned Outage Notification Letter ("Notification Letter"). These projected emissions increases far exceed the NSR significance threshold and required DTE to obtain a NSR permit *prior* to beginning actual construction.[3] However, DTE's Notification Letter claims that the entire projected emission increase may be excluded under the NSR Demand Growth (or Capable of Accommodating) Exclusion. *See* Mich. Admin. Code R. 1801(ll)(ii)(C); *see also,* 40 C.F.R. § 52.21(b)(41)(ii)(c). Despite repeated requests, DTE has failed to provide any basis to invoke this exclusion.

The standard for excluding any portion of an emissions increase requires a utility to show that "(1) [t]he unit could have achieved the necessary level of utilization during the consecutive 24-month period [the source] selected to establish the baseline actual emissions; *and* (2) the increase is not related to the physical or operational change(s) made to the unit."[4] *New York v. U.S. E.P.A.*, 413 F.3d 3, 33 (D.C. Cir. 2005) (citing 67 Fed Reg. at 80,203); *see also* Mich. Admin. Code R. 1801(ll)(ii)(C) (emphasis added). EPA explained in the 2002 Technical Support Document for the Prevention of Significant Deterioration and Non-Attainment New Source Review Rules (NSR Reform TSD) that "even if the operation of an emissions unit to meet a particular level of demand could have been accomplished during the representative baseline period, but it can be shown that the increase is related to the changes made to the unit, then the emissions increases resulting from the increased operation must be attributed to the modification project, and cannot be subtracted from the projection of post-change actual emissions." NSR Reform TSD at I-4-19.

In our May 28, 2010 Information Request to DTE, EPA sought any information that DTE believes supports the contention that the work done during the outage does not require a permit. The information provided by DTE on June 1, 2010, in response to EPA's section 114 information request failed to address why the projected emissions increase was unrelated to the project.

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[3] DTE's Notification Letter was sent to Michigan *one* day before DTE commenced construction on the project.

[4] DTE claims that it was capable of accommodating the additional generation in the baseline period. June 1, 2010 Letter at 4-5. Under the standard set forth by EPA and the courts, however, being capable of accommodating the increase is not sufficient. The source must also show that the increase was unrelated to the project. DTE has failed to do so.

DTE Data: Charts

The Letter includes a table that purportedly confirms the company's conclusions and is based on the Company's 2009 PROMOD runs. However, the data is the table is not consistent with any of the data the company has previously produced to the state of Michigan in the March 12, 2010 letter or to EPA in response to CAA Section 114 information requests. Please explain the discrepancy between the information DTE provided on March 12 and June 3, which are consistent with each other, and what DTE presented in the Letter.

In addition, the SO_2 emissions rate set forth in the March 12, 2010 letter for the July 2006 to June 2008 baseline period does not appear to match the company's reported data provided to Clean Air Markets Division. Please provide the basis for the emission rates set forth in the March 12 letter Table 1.

EXCESS EMISSIONS

We simply disagree with DTE's contentions related to the United States' excess emissions analysis. First, our calculation was based on rates DTE has actually achieved at Monroe 2's sister units, so we believe those rates are realistic for Monroe Unit 2, particularly as a way to estimate emissions reductions. In any event, given the substance of your offer, it does not appear that the precision of the excess emissions estimate is relevant. Second, as you know, NSR is a pre-project permitting requirement. Once the modification has begun, it is too late for the source to limit its emissions or otherwise avoid permitting. Guidance on the Appropriate Injunctive Relief for Violations of Major New Source Review Requirements, Nov. 17, 1998. The same argument DTE raises in its letter was aired and rejected in the *Cinergy* litigation, where the court adopted the excess emissions theory proposed by the United States. *See United States v. Cinergy Corp.*, 618 F. Supp. 2d 942 (S.D. Ind. 2009).

DTE'S SETTLEMENT FRAMEWORK

As stated above, DTE's proposed settlement framework fails to meet the criteria EPA set forth in the June 16, notice of violation ("NOV") conference. Agreeing to an after-the-fact synthetic minor limit does not adequately mitigate the violation. The Letter also provides (assuming other conditions are met) that DTE will install and operate an FGD and an SCR system on Monroe Unit 2 by January, 2015. This offer is inconsistent with statements DTE made to EPA during a CAA inspection of the Monroe Station on June 3, 2010 and inconsistent with a Business Wire Press Release dated April 30, 2010 announcing that Babcock & Wilcox Power Generation Group, Inc. ("B&W"), has signed a $90 million contract to design, engineer, procure and construct a wet FGD system for DTE's Monroe Power Plant. According to the article, Monroe Unit 2 "is scheduled for a spring 2014 start-up."

DTE's proposal does not provide the necessary relief so we are reiterating our position that DTE must mitigate all excess emissions currently being emitted by Monroe Unit 2. As previously stated, we estimate these excess emissions to be the difference between the uncontrolled emissions currently being emitted and controlled emissions (i.e. assuming the installation of a FGD and SCR). We understand that the installation of an FGD and SCR at Monroe Unit 2 will require years to properly design and install and are therefore willing to discuss other options to mitigate the excess emissions in the interim. Such potential options might include such technologies as dry sorbent injection (DSI), lower sulfur coal, or selective non-catalytic reduction (SNCR). We believe that these installations could be installed on other uncontrolled units in the DTE system on a quicker timeframe and could provide the necessary reductions to make up for the excess emissions from Monroe Unit 2 until BACT – level controls are installed.

As reflected in the June 4, 2010 NOV and our discussion on June 16, we believe DTE's violation of law compels EPA to act. While we remain willing to discuss a system wide settlement, and will review any offer DTE wishes to provide in response to the settlement proposal we provided in March 2010, we are obligated in the meantime to continue to explore and exercise our options for expedited relief of this ongoing violation.

Sincerely,

Apple Chapman
Attorney, Air Enforcement Division